

DOCUMENTS

RELATING TO THE

ST. LAWRENCE POWER COMPANY

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[No. 230.—1919.]

[230]

DOCUMENTS RELATING TO THE ST. LAWRENCE RIVER POWER COMPANY

The Acting Secretary of State for External Affairs begs to lay upon the Table of the House of Commons,—

1. Copy of a report of the Committee of the Privy Council approved by His Excellency the Governor-General on the 2nd of September, 1918, in reference to the application of the St. Lawrence River Power Company, a corporation of the State of New York, for the approval of a project to construct certain works in the South Sault Channel of the St. Lawrence River, an international navigable boundary water.

2. Copy of Order-in-Council of the 2nd of September, 1918, appointing the Hon. Arthur Meighen, Minister of the Interior and Hon. A. L. Sifton, Minister of Customs and Inland Revenue, to represent the Government of Canada, at a conference with the representatives of the United States Government concerning the application of the St. Lawrence River Power Company.

3. Copy of a report of the Committee of the Privy Council approved by His Excellency the Governor-General on the 12th of October, 1918, in reference to the result of negotiations by the Hon. Arthur Meighen and the Hon. A. L. Sifton, as representatives of the Government of Canada with the representatives of the United States Government in reference to the said application of the St. Lawrence River Power Company and also in reference to the order of the International Joint Commission, authorizing the St. Lawrence River Power Company to construct certain works in the South Sault Channel of the St. Lawrence River.

4. Copy of the order of the said International Joint Commission authorizing the construction of the said works dated September 4, 1918.

5. The interim order and opinion of International Joint Commission, in the matter of the application of the St. Lawrence River Power Company, for the approval of the construction and maintenance of a submerged weir in the South Channel of the St. Lawrence river near the mouth of its power canal at Massena, New York.

6. The statement of the case of the Government of the Dominion of Canada on such application.

P.C. 2144.

Certified copy of a Report of the Committee of the Privy Council, approved by His Excellency the Governor General on the 2nd September, 1918.

The Committee of the Privy Council have had before them a report, dated 31st August, 1918, from the Right Honourable Sir George E. Foster, Acting Secretary of State for External Affairs, submitting that there has recently been before the International Joint Commission an application of the St. Lawrence River Power Company, a corporation of the State of New York, for the approval of a project to construct certain works in the South Sault Channel of the St. Lawrence River, an international navigable boundary water: that as a result of this proceeding a situation has arisen

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that may seriously affect Canadian interests: and that for the reasons set out in the memorandum hereto annexed, it is desirable that the whole matter should be made the subject of direct discussion and settlement with the Government of the United States.

The minister, therefore, recommends that representatives of this government be delegated and empowered to approach the United States Government through the appropriate channel and to enter into negotiations upon the matter with representatives of that government upon the basis of the annexed memorandum.

The Committee concur in the foregoing recommendation, and submit the same for approval.

RODOLPHE BOUDREAU,

Clerk of the Privy Council.

MEMORANDUM.

The St. Lawrence River Power Company, a corporation of the State of New York, has made, under what is conceived to be the authority of the Treaty of January 11, 1909, between the United States and His Majesty the King, an application to the International Joint Commission for the approval of a project to construct a submerged weir in the South Sault Channel of the St. Lawrence River. The South Sault Channel is an international boundary water, and the Government of Canada and the United States having appeared by counsel in the proceeding and the hearing thereon, certain questions have arisen that affect not only the treaty relations between Canada and the United States and the powers of the International Joint Commission, but also the prosecution of the European war. For the reasons hereinafter indicated, it appears desirable that the matter should be made immediately the subject of direct consultation and negotiation between the two Governments.

The position as reported by counsel for the Canadian Government may be here summarized. In September 1917, the St. Lawrence River Power Company applied for and secured permission from the Secretary of War of the United States to undertake certain works in the South Sault Channel, namely, to dredge a channel through what is known as Dodge's Shoal, to construct a moveable ice boom, and to extend to Long Sault Island, by means of a submerged weir, the jetty or deflecting dyke already existing in the South Sault Channel. It was stated that the object in view was, through the effect of these works on the river ice-formations, to secure during the winter season an increased development of hydro-electric power in the company's power plant at Massena, New York, which is dependent for its operation upon a diversion of the waters of the St. Lawrence River. The construction of the submerged weir, was only permitted by the Secretary of War subject to the approval of the International Joint Commission; the other works, however, were approved, without the knowledge of the Canadian Government and without any reference to the Commission, and have in whole or in part been proceeded with.

Although the immediate completion of all these works has been represented as being highly desirable and even urgently necessary, almost a year was allowed to elapse before the St. Lawrence River Power Company took steps to fulfil the condition imposed by the Secretary of War in respect of the proposed submerged weir; it was not until August 9, 1918, that the company's plans and application for approval thereof were filed at the offices of the International Joint Commission at Washington. Thereafter, on August 12, before any notice of the application has been formally served upon the Canadian Government, counsel for the United States Government presented a motion before the International Joint Commission in the course of a hearing upon another matter, praying that the hearing on the application should proceed at that session notwithstanding the Commission's rules of procedure, which require notice and publication of the application and provide for a considerable period for the filing of

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counter statements. In support of his motion counsel represented on behalf of the United States that the St. Lawrence River Power Company was supplying the electrical power essential to its parent corporation, the Aluminum Company of America, one of the world's chief producers of aluminum; that the proposed works would result in an increased production of aluminum during the coming winter months estimated at six million pounds; and that this increased production was urgently necessary for the purposes of the Government of the United States and the Allies in the prosecution of the War. Counsel, therefore, urged that it should be made possible to hold an immediate hearing on the merits of the application.

Counsel for the Canadian Government, having had no opportunity to secure instructions, opposed the motion, declaring at the same time the readiness of his Government to co-operate in all necessary war measures and urging that the matter was more properly one for direct consultation between the Governments.

After consideration the International Joint Commission ordered the suspension of the rules and fixed the hearing of the application for August 29 at Montreal.

At the hearing at Montreal counsel for the United States for the first time, came forward with a definite request that the application should be granted forthwith as an urgent war measure, and presented in support thereof a letter from the Secretary of War of the United States. Counsel for Canada submitted, and argued in support of, a statement presented to the Commission, copy of which is attached hereto. It was contended that under existing treaties the Commission was without power to grant the approval sought; and the suggestion was repeated that in any case the proper and more expeditious procedure was that of direct negotiation between the two Governments, and the Government of Canada was prepared to enter upon such negotiation immediately.

The International Joint Commission has taken the application under advisement until September 12, when it is possible of course, not certain, that a decision may be announced. It was urged at the hearing that unless the proposed work was commenced before September 15, there would be a risk that it could not be finished before the winter.

Having regard both for the necessity of securing the most effective prosecution of the War and for the great desirability of a wise regulation of the boundary water system between Canada and the United States, it is believed that the procedure pursued in this matter is not calculated to result in a mutually satisfactory solution. The Government of Canada is strongly convinced that some other and more direct means of settlement should be sought and in this conviction it submits the following considerations and suggestions:

Article VII of the Webster-Ashburton Treaty of 1842 declares "that the channels of the River St. Lawrence on both sides of Long Sault Islands and of Barnhart Island . . . shall be equally free and open to the ships, vessels and boats of both parties". This declaration, relating as it does specifically to the South Sault Channel, clearly prohibits the construction of the proposed submerged weir, which admittedly would prevent all navigation through this Channel. So far as the Treaty of January 11, 1909 goes to the question, it is equally conclusive against the project. Article VIII lays down an order of precedence to be observed among the various uses for boundary waters enumerated therein, and declares that "no use shall be permitted which tends materially to conflict with or restrain any other use which is given in preference over it in this order of precedence." In the order of precedence that follows "uses for navigation," are given preference over "uses for power and for irrigation purposes." The construction of the proposed submerged weir is sought purely for power purposes, and as such it must be held to be prohibited by Article VIII, since it would not only "tend materially to conflict with or restrain" but it would wholly prevent, the use of this channel of the St. Lawrence River for navigation. Clearly, therefore, the Inter-

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national Joint Commission is without power to approve the proposed structure, and it is apparent that the application if pressed as at present must fail.

2. It is true that the project in question might have been put forward in such a manner that it could properly have become the subject of inquiry and recommendation by the International Joint Commission. In the turn which the proceeding actually took the United States Government became in effect the real party; the case became in substance a United States Government matter. Such a case might properly have been referred to the International Joint Commission for inquiry and report under Article IX of the Treaty of January 11, 1909; for it is under this Article that governmental matters or projects should be submitted to and considered by the Commission. It need only be added here that the Government of Canada was prepared from the beginning to entertain such a course and to assist in every possible way in carrying it out.

3. As already intimated, the Canadian Government is not unmindful of the considerations of urgency advanced in this matter on behalf of the Government of the United States; it is not only ready, but is very anxious to do everything in its power to promote in every sphere of endeavour the most effective and harmonious co-operation in the prosecution of the war, in which the two governments are associated under common ideals against a common foe.

4. For this great purpose the Canadian Government recognizes that in view of the near approach of the winter season it is highly desirable that a speedy conclusion should be reached upon the question of the necessity for the construction of the proposed works in the South Sault Channel. To this end the Canadian Government would suggest that the whole matter should be withdrawn from the purview of the International Joint Commission and be made immediately the subject of diplomatic negotiation between the two governments. This suggestion is advanced in the belief not only that it will if accepted conduce to a speedy conclusion of the matter, but that it is more appropriate that all proposed measures of co-operation in respect of the war should be discussed in this manner rather than through the medium of the International Joint Commission. In the view of the Canadian Government it was never contemplated that the machinery of this Commission should be used for the settlement of such unusual executive measures as present themselves to the two governments in the extraordinary emergency that confronts them today; rather the Commission was designed to promote, for permanent and comprehensive application, the establishment of a system of principles under which a great natural highway, common to the two countries, might be wisely and deliberately developed for the common benefit. The circumstances in which the present matter has been brought forward and heard need only be recalled to show how little calculated they are to afford to the Commission the opportunity for careful and fully informed consideration that is so essential to the fulfilment of the Commission's real purpose.

5. If, therefore, the United States Government still considers that the proposed works ought to be constructed as a war measure, the Government of Canada is prepared to enter into immediate discussion upon the matter, and to that end it would propose the following as a basis.

(a) If the Government of the United States is satisfied that, unless the proposed works are constructed in the South Sault Channel, there must necessarily be a substantial shortage in the supply of aluminum for the purposes of the United States and the Allies in the prosecution of the war, the Government of Canada will assent to the proposed construction as a war measure. In pursuance of this undertaking, the present application of the St. Lawrence River Power Company to the International Joint Commission should be withdrawn.

(b) The terms upon which the proposed works shall be constructed shall be agreed upon at a conference between representatives of the two governments delegated and empowered for this purpose.

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(c) In order that the South Sault Channel may be restored to its present status, the terms should include a provision to the effect that the submerged weir, if constructed, shall be removed within twelve months after the conclusion of the European War.

(d) There shall not be diverted from the St. Lawrence river by the St. Lawrence River Power Company a greater quantity of water daily than is at present being so diverted. This paragraph is not to be construed as admitting any right on the part of the St. Lawrence River Power Company, or of any other person or corporation, to divert water from the St. Lawrence river.

(e) The Canadian Government, being advised that it would be possible to develop some seven hundred thousand horse power from the waters of the St. Lawrence river in the vicinity of the Long Sault Rapids and recognizing that any such development could only proceed under agreement between the two countries, proposes for consideration that the two governments should take immediate steps jointly to prepare a scheme looking to such power development in the interests of the two countries. In the light of this possibility the Canadian Government is strongly of the opinion that no permanent project by private interests should be permitted at this time that would prevent or interfere with the carrying out of such a joint program by the two countries.

6. In conclusion the Government of Canada earnestly trusts that by means of such a conference between the two governments as is here proposed some mutually satisfactory solution of the matter may be reached; for it would look with the gravest concern upon any casual or hastily considered project that might have serious results upon the navigability of the great highway that constitutes Canada's main artery of communication and commerce. In this connection the Canadian Government would welcome further information concerning the circumstances and authority under which the dredging of Dodge's Shoal in the South Sault Channel, hereinbefore referred to, was undertaken, for even although it should appear, as alleged, that this change in the river bed will have no effect upon the navigability of the St. Lawrence river, yet in the view of this Government it is highly desirable, in the interest of the establishment of sound principles and rules for the development of the common boundary waters, that such projects of private companies should be submitted in advance to the International Joint Commission. The Canadian Government, which is advised that this dredging has already had the serious effect of lowering by at least five inches the water at the head of the Cornwall Canal, reserves for further attention any rights in respect thereof under existing treaties.

A similar reservation is made in respect of the proposed: ice boom—the construction of which is apparently contemplated without any consultation with the Canadian Government or reference to the International Joint Commission.

OTTAWA, August 31, 1918.

P.C. 2145.

Certified copy of a Report of the Committee of the Privy Council, approved by His Excellency the Governor General on the 2nd September, 1918.

The Committee of the Privy Council, on the recommendation of the Right Honourable Sir George E. Foster, Acting Prime Minister, advise that the Honourable Arthur Meighen, Minister of the Interior, and the Honourable Arthur L. Sifton, Minister of Customs and Inland Revenue, be appointed to represent the Government of Canada, in the negotiations with the representatives of the United States Government concerning the application of the St. Lawrence River Power Company for approval of a project to construct certain works in the South Sault Channel of the St. Lawrence river.

RODOLPHE BOUDREAU,
Clerk of the Privy Council.

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P.C. 2509.

Certified copy of a Report of the Committee of the Privy Council, approved by His Excellency the Governor General on the 12th October, 1918.

The Committee of the Privy Council have had before them a Report, dated 19th September, 1918, from the Acting Secretary of State for External Affairs, submitting as follows:—

As the result of an application recently made to the International Joint Commission by the St. Lawrence River Power Company, a corporation of the State of New York, for the approval of a project to construct certain works in the South Sault Channel of the St. Lawrence river, an international navigable boundary water, a situation arose which gravely concerned Canadian interests; for in the view of this Government, already expressed at length in the Order in Council of the 2nd September, 1918, (P.C. 2144), not only was it clear that, since the proposed works would wholly prevent navigation through the South Sault Channel, the International Joint Commission was, by reason of existing treaties, between His Majesty the King and the United States, without power to sanction the project, but it was further apparent that the project itself was inconsistent with and would seriously impede the best development of the St. Lawrence river for navigation and power purposes in the interest of both countries. It was also the view of this Government that the construction of such works was in no wise necessary for the attainment of the end desired by the St. Lawrence River Power Company, as expressed in their application, but that other effective and wholly unobjectionable means were available for that purpose. Accordingly it became the duty of the Government to appear formally before the International Joint Commission and to enter its strong objection to any consideration of the application by that tribunal. At the same time it appeared that the Government of the United States had come forward in support of the application and was urging its immediate approval as an urgent war measure.

In these circumstances this Government, with every desire to promote the most effective co-operation in the prosecution of the war, proposed, as will appear from the said Order in Council of the 2nd September, 1918, that the matter should be withdrawn from the International Joint Commission and discussed directly between the two Governments with a view to securing the immediate accomplishment of the desire and purpose of the United States Government and at the same time preserving the position of this country in respect of its treaty rights and its interest in the sound development of the St. Lawrence river for navigation and power purposes. The proposal was indeed calculated to secure this purpose of the United States Government more expeditiously than was possible through the medium of the Commission, even if the Commission had had power to entertain the same.

In pursuance of this proposal two members of the government proceeded to Washington and presented the position in greater detail to the Secretary of State of the United States. It may be added here that the proposal was not at that time accepted, nor has it since been accepted; in fact, no reply thereto has yet been received from the United States Government.

Subsequently, on the 14th September, 1918, the International Joint Commission reached a decision on the application and delivered an order, copy of which is appended hereto, approving the construction of the proposed works on certain conditions therein set forth. At the same time the order reserves for further consideration the question whether under the terms of existing treaties the Commission has power to approve the proposed structure. It should be added that the Canadian Government through its counsel had already, before the issuance of the order, acquainted the Commission with the terms of the Order in Council of the 2nd September, 1918, setting forth its view that the Commission was without power to make such an order.

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It is worthy of note that the Commission in issuing the order expressly declines to decide whether it actually has power to do so. In exercising authority it leaves for future determination the controlling question as to whether it possesses any such authority. However, it cannot be doubted that the issuance of the order is in itself an assumption of such authority.

Thus confronted with an assumption of power on the part of the International Joint Commission, which in the opinion of the law officers of the Crown was entirely unwarranted, it is necessary to determine at once the course of the government. A conclusion as to the course to be pursued under such conditions is not without difficulty. It is pertinent however, to recall that in a former case presenting a similar situation, the Government of the United States refused to recognize the jurisdiction of the International Joint Commission. In the matter of the division of the waters of the St. Mary and Milk rivers, then pending before the Commission, it appears from a despatch from His Majesty's Ambassador at Washington, dated November 13, 1917, that the United States Secretary of State, by letter dated November 8, 1917, informed the Ambassador that since the Commission had under consideration the question of its authority to interpret or construe Article VI of the Treaty of January 11, 1909, and since in the view of his Government the Commission had no such authority in the then state of the case, he had deemed it proper to inform the Commission that whatever conclusion was reached by the Commission could not be regarded as binding upon his government in so far as it undertook to construe the Article in question.

In view of the foregoing, the minister recommends that the Government of the United States be informed that this Government feels bound to repeat its view that, for the reasons already indicated, the International Joint Commission was without authority to approve the application of the St. Lawrence River Power Company, and that the order of the Commission assuming to grant such approval cannot be regarded by the Government of Canada as binding upon this Dominion.

The Government of the United States will readily understand that in taking this course the Canadian Government is actuated only by its concern for those treaties and conventions that have so happily promoted the friendly relations between the two countries, and by the belief that it is through a jealous regard for the integrity of such understandings that these fortunate relations may best be maintained.

It is with this purpose also that the Canadian Government deems it appropriate to refer here to the proposal made in the Order in Council of the 2nd September, 1918, that the two Governments should take immediate steps jointly to prepare and carry out a scheme looking to the most economical and comprehensive development of the waters of the St. Lawrence River in the interests of the people of both countries. Even though the utilization of only a portion of the whole capacity of the river can be immediately contemplated, yet the endeavour should be to design at the outset a complete scheme into which successive developments might be fitted from time to time as and when the occasion might demand. Without some such scheme there is always present the great danger that the ultimate possibilities of St. Lawrence navigation may be neglected or even irreparably injured; for it must be borne in mind, not only that navigation is the paramount national and international use of this great highway of commerce, but that the possibilities of the stream in this respect have been as yet by no means fully developed. On the other hand it is certain that the subordinate and incidental but important use of these international boundary waters for power purposes can never be rendered as efficient and productive through a policy of simply permitting a haphazard series of unrelated private enterprises as through a carefully considered and comprehensive scheme of development carried out under public auspices by the two countries; and obviously it is only by agreement and concerted action between the two countries that such a development can be undertaken.

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But, as already intimated, this is not all; there is, in addition to the economic advantages, the much more important consideration affecting the status of the treaties and conventions between the two countries. For the adoption of the proposed joint project as an international policy would, it is conceived, be calculated to obviate many occasions for public dissatisfaction and misunderstanding that on the one side or the other might otherwise arise from time to time in respect of private exploitations of the uses of these waters. Unquestionably these uses are becoming more and more regarded as public uses, and it follows that the responsibility for their development should be undertaken, and the benefits of such development enjoyed, by the public. Indeed, for this reason and in view of the other considerations here adduced the Canadian Government is strongly convinced that nothing should be allowed to prejudice the chance of such a comprehensive power development of the St. Lawrence waters, and so far as its consent may be necessary, it will, therefore, be unable to sanction further private enterprise of this nature.

The Committee concur in the foregoing report and the recommendations therein made and recommend that Your Excellency may be pleased to transmit a copy hereof immediately to His Majesty's Ambassador at Washington for communication to the Government of the United States, and also that a copy be transmitted to the International Joint Commission.

All which is respectfully submitted for Your Excellency's approval.

RODOLPHE BOUDREAU.

Clerk of the Privy Council.

In the matter of the Application of the St. Lawrence River Power Company for the approval of the construction and maintenance of a submerged weir in the south channel of the St. Lawrence River near the mouth of its power canal at Massena, New York.

Whereas, by its application dated July 25, 1918, as subsequently amended with the permission of the Commission, the St. Lawrence River Power Company, a corporation organized under the laws of the State of New York, having its principal office at Massena, New York, applied to this Commission for its approval of the construction and maintenance of a submerged weir in the St. Lawrence River extending from the existing jetty of the said Company below the intake of its power canal to Long Sault Island in said river and being wholly within the territory of the United States, which construction has been authorized by the United States and approved by a permit of the Secretary of War bearing number 38786/64, dated September 10, 1917, and attached to said application, which said permit contains, among others, the following provisions:

"That if future operations by the United States require an alteration in the position of the structure or work herein authorized, or if, in the opinion of the Secretary of War, it shall cause unreasonable obstruction to the free navigation of said water, the permittee will be required, upon due notice from the Secretary of War, to remove or alter the structural work or obstructions caused thereby without expense to the United States so as to render navigation reasonably free, easy and unobstructed, and if, upon the expiration or revocation of this permit, the structure, fill, excavation or other modification of the water-course hereby authorized shall not be completed, the permittee, at his own expense, and to such extent and in such time and manner as the Secretary of War may require, shall remove all or any portion of the uncompleted structure or fill and restore to its former condition the navigable capacity of the water-course. No claim shall be made against the United States on account of any such removal or alteration." and

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Whereas, said application was first presented to the Commission at its session at Atlantic City, New Jersey, on August 12, 1918, whereupon counsel appearing for and on behalf of the United States applied for an immediate hearing on said application, representing as was also alleged by the applicant, that the said St. Lawrence River Power Company is a subsidiary of the Aluminum Company of America; that the applicant company had for many years developed hydro-electric power in its power house at Massena, N.Y., using water for that purpose taken from the South Channel of the St. Lawrence River immediately below Dodges Shoal via its power canal and Grasse river near Cornwall Island, that the hydro-electric power thus produced is used mainly in the production of aluminum by the said Aluminum Company of America; that the demand on this company to supply aluminum is most urgent and insistent and practically their entire output is being taken by the United States and allied governments for military purposes in the prosecution of the present war; that during the months of January, February, March and part of April in each year huge ice jams in the said south channel cause practically a shutdown of the said plant and an annual reduction in the output amounting to over six million pounds, and that these serious ice difficulties can be remedied by the construction of the said submerged weir, and counsel for the United States Government therefore applied to the Commission for an order for the suspension of its Rules of Procedure so as to permit of the immediate hearing of the said application and in support of said motion submitted letters from the Chairman of the War Industries Board of the United States and the Acting Director of Aircraft Production urgently praying for favourable consideration and approval of the application herein, and

Whereas, by its order dated at Atlantic City, August 13, 1918, the Commission suspended Rules 9, 10, 11, 12 and 13 of its Rules of Procedure and ordered that a hearing on said application be fixed for the 29th day of August, 1918, at 10 a.m. of that day in the City of Montreal, Quebec, and

Whereas, at the time and place agreed upon the hearing having taken place, the Commission at the conclusion of the evidence of the applicant, heard counsel on its behalf, as well as counsel on behalf of the United States, the Dominion of Canada, the Province of Ontario, and the State of New York, and also on behalf of several private and corporate interests, no testimony having been presented by either Government or by any interest in opposition to said application, and

Whereas, at the said hearing at Montreal counsel for the United States presented to the Commission a letter from the Secretary of War of the United States to the Commission, requesting in order to meet the urgent necessity for the increased production of aluminum for the prosecution of the present war, that the permit he had granted to the applicant receive the approval of the Commission, and

Whereas, the Dominion of Canada by its Statement in Response and also at the said hearing denied the jurisdiction of the Commission to entertain and grant the said application, alleging that under Article VII of the Webster-Ashburton Treaty of August 9, 1842, it is stipulated that the channels in the River St. Lawrence on both sides of Long Sault Island and Barnhart Island shall be equally free and open to ships, vessels and boats of both parties, and also that by the Treaty of January, 1909, between Great Britain and the United States it was agreed that the navigation of all navigable boundary waters shall for ever continue free and open for the purposes of commerce to the inhabitants and to the ships, vessels and boats of both countries, and

Whereas, the Commission at Montreal, on the 31st August having duly considered the said application and the evidence offered in support thereof and the said exception to its jurisdiction, adjourned its sitting to the 12th day of September at the City of New York, when it continued the consideration thereof on the said and following days, and

Whereas, the Commission is of opinion that the said submerged weir would be an obstruction in a boundary water on the United States side of the boundary line which

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would alter the level on the Canadian side thereof, and therefore the Commission has, under Articles III and VIII of the Treaty of 1909, full jurisdiction and authority to pass upon the said application, and

Whereas, the Commission is of the opinion that in order to arrive at a final decision further evidence should be taken and further argument submitted, especially with regard to the effect of Article VII of the Webster-Ashburton Treaty in so far as it may or may not constitute a bar to the construction of the said weir, and with regard to the question of whether said Article has been superseded by the Treaty of January, 1909, and

Whereas, the war necessities of the allied governments imperatively demand that the production of aluminum at the applicant's plant at Massena be increased as much as possible during the winter months, and

Whereas, if further appears that the construction of the said submerged weir must be immediately commenced and be completed by the 15th day of December next in order that the production of aluminum for the present year may be increased.

Therefore, without at the present time finally deciding the question whether the Commission should approve the construction and permanent maintenance of the said weir, and without prejudice in any way to its right to decide such question hereafter, and in view of the pressing necessity for the immediate increase for war purposes of the available supply of aluminum and at the urgent request of the United States.

It is hereby ordered, as an interim measure, that the construction of the said weir and its maintenance until the expiration of the term of five years from the date hereof, or until the termination of the present war, is hereby approved upon the following conditions:—

(1) That at the expiration of said period of five years, or upon the termination of the present war, whichever shall last occur, said weir shall be removed by the applicant, reserving, however, to the applicant or any other interested party the right to apply to the Commission at least one year before the expiration of the said period for a further continuance of the said weir, and on such application the Commission may approve of such continuance on such terms and conditions as it may deem appropriate and equitable for the protection of the rights and interests of the people on either side of the line in accordance with Article VIII of the Treaty of 1909;

(2) That the said weir shall be constructed and maintained in accordance with the plans mentioned and under all the terms and conditions set forth in the paragraphs number from 1 to 11, both inclusive, in the permit therefor granted by the Secretary of War dated September 10, 1917, so far as same are applicable;

(3) That for the purpose of protecting the rights, property and interest on either side of the boundary from any injurious effect resulting from the construction and maintenance of said weir the Commission will during the terms of its approval herein retain jurisdiction over the subject matter of said application, and may make such further order or orders in the premises as may be necessary.

Provided, That in making the foregoing order the Commission shall not be deemed to have considered nor passed upon any question pertaining to the right of the applicant to divert water from the St. Lawrence River.

Dated at New York, September 14, 1918.

C. A. MAGRATH,
O. GARDNER,
HENRY A. POWELL,
JAMES A. TAWNSY,
P. B. MIGNAULT,
R. B. GLENN.

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INTERNATIONAL JOINT COMMISSION

IN THE MATTER OF THE APPLICATION OF THE ST. LAWRENCE RIVER POWER COMPANY FOR THE APPROVAL OF THE CONSTRUCTION AND MAINTENANCE OF A SUBMERGED WEIR IN THE SOUTH CHANNEL OF THE ST. LAWRENCE RIVER NEAR THE MOUTH OF ITS POWER CANAL AT MASSENA, NEW YORK.

INTERIM ORDER.

Whereas, by its application dated July 25, 1918, as subsequently amended with the permission of the Commission, the St. Lawrence River Power Company, a corporation organized under the laws of the state of New York, having its principal office at Massena, New York, applied to this Commission for its approval of the construction and maintenance of a submerged weir in the St. Lawrence river extending from the existing jetty of the said company below the intake of its power canal to Long Sault island in said river and being wholly within the territory of the United States, which construction has been authorized by the United States and approved by a permit of the Secretary of War bearing number 38786/64, dated September 10, 1917, and attached to said application, which said permit contains, among others, the following provisions:

"That if future operations by the United States require an alteration in the position of the structure or work herein authorized, or if, in the opinion of the Secretary of War, it shall cause unreasonable obstruction to the free navigation of said water, the permittee will be required, upon due notice from the Secretary of War, to remove or alter the structural work or obstructions caused thereby without expense to the United States so as to render navigation reasonably free, easy and unobstructed; and if, upon the expiration or revocation of this permit, the structure, fill, excavation or other modification of the water-course hereby authorized shall not be completed, the permittee, at his own expense, and to such extent and in such time and manner as the Secretary of War may require, shall remove all or any portion of the uncompleted structure or fill and restore to its former condition the navigable capacity of the water-course. No claim shall be made against the United States on account of any such removal or alteration;" and

Whereas, said application was first presented to the Commission at its session at Atlantic City, New Jersey, on August 12, 1918, whereupon counsel appearing for and on behalf of the United States applied for an immediate hearing on said application, representing, as was also alleged by the applicant, that the said St. Lawrence River Power Company is a subsidiary of the Aluminum Company of America; that the applicant company had for many years developed hydro-electric power in its power house at Massena, N.Y., using water for that purpose taken from the South channel of the St. Lawrence river immediately below Dodges shoal via its power canal and Grasse river near Cornwall island; that the hydro-electric power thus produced is used mainly in the production of aluminum by the said Aluminum Company of America; that the demand on this company to supply aluminum is most urgent and insistent, and practically their entire output is being taken by the United States and Allied Governments for military purposes in the prosecution of the present war; that during the months of January, February, March and part of April in each year huge ice jams

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in the said South channel cause practically a shutdown of the said plant and an annual reduction in the output amounting to over six million pounds, and that these serious ice difficulties can be remedied by the construction of the said submerged weir, and counsel for the United States Government therefore applied to the Commission for an order for the suspension of its Rules of Procedure so as to permit of the immediate hearing of the said application and in support of said motion submitted letters from the Chairman of the War Industries Board of the United States and the Acting Director of Aircraft Production urgently praying for favourable consideration and approval of the application herein, and

Whereas, by its order dated at Atlantic City, August 13, 1918, the Commission suspended rules 9, 10, 11, 12 and 13 of its Rules of Procedure and ordered that a hearing on said application be fixed for the 29th day of August, 1918, at 10 a.m. of that day in the city of Montreal, Que., and

Whereas, at the time and place agreed upon the hearing having taken place, the commission at the conclusion of the evidence of the applicant, heard counsel on its behalf, as well as counsel on behalf of the United States, the Dominion of Canada, the province of Ontario, and the state of New York, and also on behalf of several private and corporate interests, no testimony having been presented by either Government or by any interest in opposition to said application, and

Whereas, at the said hearing at Montreal counsel for the United States presented to the Commission a letter from the Secretary of War of the United States to the Commission, requesting in order to meet the urgent necessity for the increased production of aluminum for the prosecution of the present war, that the permit he had granted to the applicant receive the approval of the Commission, and

Whereas, the Dominion of Canada by its Statement in Response and also at the said hearing denied the jurisdiction of the Commission to entertain and grant the said application, alleging that under Article VII of the Webster-Ashburton Treaty of August 9, 1842, it is stipulated that the channels in the river St. Lawrence on both sides of Long Sault island and Barnhart island shall be equally free and open to ships, vessels and boats of both parties, and also that by the Treaty of January 11, 1909, between Great Britain and the United States it was agreed that the navigation of all navigable boundary waters shall for ever continue free and open for the purposes of commerce to the inhabitants and to the ships, vessels and boats of both countries, and

Whereas, the Commission at Montreal, on the 31st August, having duly considered the said application and the evidence offered in support thereof, and the said exception to its jurisdiction, adjourned its sitting to the 12th day of September at the city of New York, when it continued the consideration thereof on the said and following days, and

Whereas, the Commission is of opinion that the said submerged weir would be an obstruction in a boundary water on the United States side of the boundary line which would alter the level on the Canadian side thereof, and therefore the Commission has, under Articles III and VIII of the Treaty of 1909, full jurisdiction and authority to pass upon the said application, and

Whereas, the Commission is of the opinion that in order to arrive at a final decision further evidence should be taken and further argument submitted, especially with regard to the effect of Article VII of the Webster-Ashburton Treaty in so far as it may or may not constitute a bar to the construction of the said weir, and with regard to the question of whether said article has been superseded by the Treaty of January 11, 1909, and

Whereas, the war necessities of the Allied Governments imperatively demand that the production of aluminum at the applicant's plant at Massena be increased as much as possible during the winter months, and

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Whereas, it further appears that the construction of the said submerged weir must be immediately commenced and be completed by the 15th day of December next in order that the production of aluminum for the present year may be increased;

Therefore, without at the present time finally deciding the question whether the Commission should approve the construction and permanent maintenance of the said weir, and without prejudice in any way to its right to decide such question hereafter, and in view of the pressing necessity for the immediate increase for war purposes of the available supply of aluminum, and at the urgent request of the United States.

It is hereby ordered, as an interim measure, that the construction of the said weir and its maintenance until the expiration of the term of five years from the date hereof, or until the termination of the present war, is hereby approved upon the following conditions: —

(1) That at the expiration of said period of five years, or upon the termination of the present war, whichever shall last occur, said weir shall be removed by the applicant; reserving, however, to the applicant or any other interested party the right to apply to the Commission at least one year before the expiration of the said period for a further continuance of the said weir, and on such application the Commission may approve of such continuance on such terms and conditions as it may deem appropriate and equitable for the protection of the rights and interests of the people on either side of the line in accordance with Article VIII of the Treaty of 1909.

(2) That the said weir shall be constructed and maintained in accordance with the plans mentioned and under all the terms and conditions set forth in the paragraphs numbered from 1 to 11, both inclusive, in the permit therefor granted by the Secretary of War dated September 10, 1917, so far as same are applicable.

(3) That for the purpose of protecting the rights, property and interests on either side of the boundary from any injurious effect resulting from the construction and maintenance of said weir the Commission will, during the term of its approval herein, retain jurisdiction over the subject matter of said application, and may make such further order or orders in the premises as may be necessary.

Provided, that in making the foregoing order the Commission shall not be deemed to have considered nor passed upon any question pertaining to the right of the applicant to divert water from the St. Lawrence river.

Dated at New York, N.Y., September 14, 1918.

C. A. MAGRATH.
O. GARDNER.
HENRY A. POWELL.
JAMES A. TAWNEY.
P. B. MIGNAULT.
R. B. GLENN.

INTERNATIONAL JOINT COMMISSION.

IN THE MATTER OF THE APPLICATION OF THE ST. LAWRENCE RIVER POWER COMPANY FOR THE APPROVAL OF THE CONSTRUCTION AND MAINTENANCE OF A SUBMERGED WEIR IN THE SOUTH CHANNEL OF THE ST. LAWRENCE RIVER NEAR THE MOUTH OF ITS POWER CANAL AT MASSENA, NEW YORK.

OPINION.

This is an application by the St. Lawrence River Power Company, a corporation organized under the laws of the state of New York, having its principal office at Massena, New York, for the approval by this Commission of a submerged weir to be constructed in the south channel of the St. Lawrence river from the existing jetty of the company, below the intake of its power canal, to Long Sault island.

THE APPLICATION.

In its application the company alleges in substance that it is a subsidiary of the Aluminum Company of America, and has for many years developed hydro-electric power in its power-house at Massena, using water taken from the south channel of the St. Lawrence river immediately below Dodges shoal, via its power canal and Grasse river, through which the water is returned to the St. Lawrence river near Cornwall island; that this hydro-electric power is used mainly in the production of aluminum by the said Aluminum Company of America; that the demand on this company to supply aluminum is most urgent and insistent and practically the entire output is being taken by the United States and allied Governments for military purposes in the prosecution of the present war; that aluminum is smelted by electricity generated by water power, and the Massena plant of the Aluminum Company of America has a capacity of 85,000 horse-power generated from the water of the St. Lawrence river, but during the months of January, February, March and part of April in each year huge ice jams in the south channel cause practically a shut-down of the said plant and an actual reduction of the output amounting to over six million pounds, and that these serious ice difficulties can be remedied by the construction of the weir, that the company applied to the Secretary of War of the United States for permission to extend to Long Sault island by means of a submerged weir its jetty or deflecting dyke in the south channel, which permission was granted subject to the approval of the Commission, by permit dated September 10, 1917; that the jetty, the site of the proposed submerged weir, the south channel, Dodges shoal, the rapids, the power canal, power-house, Grasse river, and all the waterways constituting the power developments are within the United States and are all separated from the international boundary by Long Sault island, which is also a part of the United States; that the effect of the proposed improvement in conjunction with the existing development will be to improve winter conditions, increase the output of aluminum, maintain public service and establish navigation to the town of Massena, without making diversion of water materially different from what it has been in the past and without materially affecting the level of the boundary waters on the Canadian side of the St. Lawrence river; and the applicant therefore prayed that the Commission approve of the construction of the said submerged weir.

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REQUEST FOR A PROMPT HEARING.

This application was first presented to the Commission at Atlantic City, N.J., on August 12, 1918, having been filed in the offices of the Commission a few days previously, and Mr. George W. Koonce, of counsel for the United States, applied to the Commission, at the instance of the Government of that country, for an immediate hearing of the application, representing that aluminum is urgently required by the United States Government and all the allied Governments for the prosecution of the present war, being used in the construction of aeroplanes, motor trucks, mess utensils, camp outfits; that owing to ice troubles last winter at Massena, the output of the company was cut down to 28 per cent in January, and to 11 per cent in February, of the normal production, and that the proposed submerged weir is designed to correct these ice troubles and to allow the production of aluminum to be maintained at the highest efficiency during the winter months. He added that the company furnishes 60 per cent of the aluminum used by Great Britain in the present war, $33\frac{1}{2}$ per cent of that utilized by France, and 75 per cent of that used by Italy, and that the United States Government gets its whole supply from the company. In support of his application for an immediate hearing, he produced letters from Mr. B. M. Baruch, Chairman of the War Industries Board, and from Mr. M. W. Kellogg, Acting Director of Aircraft Production, urgently requesting a speedy and favourable consideration of the application of the St. Lawrence River Power Company. These letters are printed in the appendix to this opinion.

Mr. Frank H. Keefer, of counsel for the Dominion of Canada, was present when Mr. Koonce applied for this hearing, but he stated that he was not authorized to give his assent thereto.

The Commission did not grant an immediate hearing to the applicant company, but it considered that the urgency of the occasion called for a suspension of its rules of procedure so as to expedite as much as possible the hearing of the application, and, by its order bearing date August 13, it ordered that the hearing be held on the 29th day of August, at 10 a.m., at Montreal, Que., and that all statements in response to the application be filed on or before the 26th day of August.

THE HEARING.

The hearing took place at Montreal, as arranged, on August 29 and 30, and the following appearances were announced:—

Mr. George B. Gordon, Pittsburg, representing the applicant;

Mr. Leighton McCarthy, K.C., Toronto, representing the applicant;

Mr. George W. Koonce, Washington, representing the United States Government;

Mr. John C. Churchill, Washington, representing the Corps of Engineers, United States Army;

Hon. Hugh Guthrie, Ottawa, Solicitor General for the Dominion of Canada;

Mr. Frank H. Keefer, K.C., M.P., Ottawa, representing the Dominion of Canada;

Mr. William J. Stewart, Ottawa, chief hydrographer of the Dominion of Canada;

Mr. S. J. Chapleau, Ottawa, representing the Department of Public Works of Canada;

Mr. James White, Ottawa, representing the Commission of Conservation of Canada;

Mr. Arthur V. White, consulting engineer of the Commission of Conservation of Canada;

Mr. George H. Kilmer, K.C., Toronto, representing the province of Ontario;

Mr. H. G. Acres, Toronto, representing the Hydro-Electric Power Commission of Ontario;

Mr. Marshall McLean, New York, special deputy attorney-general of the State of New York;

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Mr. A. H. Perkins, division engineer of the Conservation Commission of the State of New York;

Mr. Francis King, K.C., Kingston, Ont., representing the Dominion Marine Association;

Mr. F. E. Meredith, K.C., Montreal, representing the Montreal Harbour Commissioners;

Mr. John Baillie, Montreal, representing the Montreal Board of Trade.

STATEMENT IN RESPONSE TO THE APPLICATION.

Formal statements in response were filed by most of the governments (other than the United States government, on behalf of which Mr. Koonce asked that the application be granted) and interests represented.

The position taken by the Government of the Dominion of Canada, as well by its statement in response as by the argument of counsel on its behalf, may be briefly summarized by stating that it denied the jurisdiction of the Commission to grant the application, on the ground that the proposed submerged weir would entirely close to navigation the south channel of the St. Lawrence river at the Long Sault, and that by Article VII of the Webster-Ashburton Treaty of 1842, it was agreed that this channel "shall be equally free and open to the ships, vessels and boats of both parties," and also that by Article 1 of the Treaty of January 11, 1909 (hereafter called the Waterways Treaty) it was stipulated that "the navigation of all navigable boundary waters shall forever continue free and open for the purposes of commerce to the inhabitants and to the ships, vessels and boats of both countries equally." It is proper to add that counsel for Canada stated that the government of that country was ready to take up with the government of the United States the question of increasing for war purposes the supply of aluminum.

A great number of questions were raised by the statements in response filed by other interests, the main points submitted, which were also emphasized by the representatives of Canada, being the necessity of preserving the navigation of the south channel and the inadvisability of allowing a private corporation to make therein a power development that might prove detrimental should a larger scheme of development be adopted by two countries. It should be added that the statement in response filed by the State of New York opposed the application on the ground that the construction of the submerged weir would be an invasion of the rights of the citizens of that State in and to the navigable waters of the St. Lawrence river, and that it would necessitate the taking of a portion of the bed of the river belonging to the State.

At the hearing, evidence was offered on behalf of the applicant company as to all the pertinent facts it had alleged. No testimony whatsoever was adduced by any of the governments or interests opposing the application, their counsel having merely cross-examined the applicant's witnesses. It may be that it was considered that no further testimony was required for their purposes, but the Commission cannot but feel that the course thus pursued by those opposing the application has not aided in the discharge of the important duty imposed on the Commission by the Treaty, in the very urgent and entirely exceptional emergency under which it was obliged to discharge this duty.

Before referring to the facts established at the hearing, it will be useful to briefly describe the locality where the weir is proposed to be constructed, and also to mention the different permits obtained by the applicant from the Secretary of War of the United States.

DESCRIPTION OF LOCALITY.

There are in the St. Lawrence river at this point, four islands, Croil island, Long Sault island, Barnhart island, and Sheek island. The first three were placed in the

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United States and the fourth in Canada by the award, dated the 18th June, 1822, rendered by the commissioners appointed under Article VI of the Treaty of Ghent. On both sides of these islands are the rapids known as the Long Sault, and the international boundary runs along the main channel of the St. Lawrence river north of Croil island and of Long Sault island, and along the channel separating Sheek island from Barnhart island, locally known as the Little river. This latter channel carries however only five per cent of the water of the whole river, while the rest of the water flows south of Barnhart island, so that the main channel of the St. Lawrence river at this point is entirely in United States territory. Between Croil island and Long Sault island is a passage in which there is a small island called Delaney island, the water passage bearing the name of Little Sny and Big Sny, and the current flows north through the Big Sny towards the north channel of the river. Four-fifths of the water of the St. Lawrence river flows north of Long Sault island in the main or north channel, and one-fifth south of Long Sault island in what is known as the South Sault channel, and it is here that the proposed weir is to be built, a short distance to the east of the intake of the power canal of the applicant. This power canal was excavated several years before the Waterways Treaty was made, and runs in southeasterly direction to the power-house at Massena, some three miles from the intake, where it discharges into the Grasse river, which thus forms the tail race, and through this river the diverted water flows easterly to the St. Lawrence river near Cornwall island. On the north side of the St. Lawrence river is the Cornwall canal, the intake of which is at lock 21, north of Long Sault island, and further down stream than the intake of the power canal of the applicant on the south shore. The applicant has a jetty, to the east of the inlet of its power canal, which was built in the South Sault channel under a permit obtained in 1903 from the United States Government, and it is proposed to extend this jetty to Long Sault island by means of the submerged weir. It may be added that the power canal has a depth of thirty feet and the Grasse river below the power-house has been dredged to a depth of sixteen feet.

PERMITS OBTAINED BY THE APPLICANT FROM THE UNITED STATES GOVERNMENT.

The applicant, it appears, made one application to the Secretary of War of the United States covering three things:—

1. The dredging of the South Sault channel to a width of 150 feet and a depth of 20 feet at Dodges shoal, which is about 4,000 feet above the intake of the power canal;

2. The construction of a removable ice boom supported by permanent stone filled timber cribs between Delaney island and Talcott's point on the south shore of the river at Dodges shoal, with a wing dam extending from the main shore above Talcott's point to the upstream margin of the dredged channel for the purpose of directing the flow of water and ice across for ice diverting channels which will connect deep water with the channel to be dredged;

3. The construction of the submerged weir.

These three things really formed but one proposition, the object of which was to remedy the ice troubles, but the War Department engineers, Mr. Kroonee, says, decided to separate them. Consequently two permits were granted by the Secretary of War, one dated September 10, 1917, covering the dredging of the channel at Dodges shoal and the construction of the ice boom (filed as Exhibit 10), and the other, also dated September 10, 1917, authorizing, subject to the approval of the International Joint Commission, the construction of the submerged weir. A copy of the latter permit was attached to the application by the Commission and another copy was filed at the hearing as Exhibit 7. Subsequently, the applicant having modified its plans as to the construction of the ice boom and the dredging, it obtained from the Secretary of War

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another permit, dated April 20, 1918, and filed as Exhibit 9, under which the construction work will be carried out.

It is to be remarked, however, that the dredging of Dodges shoal is now practically completed, as it was the first work started. The piers and ice boom will be put in only if the construction of the submerged weir is authorized, so that when the matter was submitted to the Commission, an important part of the work originally considered by the applicant as constituting part of one project, had been completed.

Considering merely the dredging of a channel 150 feet wide and 20 feet in depth at Dodges shoal, that is to say the work completed under the permit of April 20, 1918, there is no room for doubt that this dredging would affect the natural level and flow of the St. Lawrence river on both sides of the international boundary, which by the terms of Article III of the Treaty is prohibited except when authorized by special agreement between the High Contracting Parties, or first approved by the Commission. Mr. James W. Rickey, chief hydraulic engineer of the Aluminum Company of America, in his evidence before the Commission, admitted that this dredging, without the compensating influence of the submerged weir, would affect the level on the north shore by possibly a couple of inches.

Mr. Koonce, when he came before the Commission at Atlantic City, said that the engineers of the War Department had satisfied themselves that the only part of the work which should be submitted for the approval of the Commission was the submerged weir, and they thought that the dredging at Dodges shoal and the construction of the piers for the ice boom would not affect the levels on the north shore so as to require the approval of the Commission under Article III of the Waterways Treaty. It is obvious, in view of the evidence, that this conclusion was erroneous, and the Commission is of the opinion that the whole of the work, and not merely the part concerning the submerged weir, should have been submitted for the approval of the Commission, as required by Article III of the Treaty. Whether or not the effect on levels of the dredging would be compensated by the construction of the submerged weir—and the approval of the Commission is necessary when merely the flow of boundary waters is affected, even supposing their level remains the same—it certainly seems strange that only the compensating work, and not the dredging requiring this compensation, should have formed the subject of the application to the Commission. Under normal conditions and under the evidence submitted—without the stress of the emergency which confronted the Commission when application was made to it to issue an order of approval, which had to be issued at once to be of any use for the coming winter—it would have been the duty of the Commission under the Treaty to consider the whole work as one project, and to have required the application to be amended accordingly. The attention of the applicant was several times during the hearing called to the requirements of Article III of the Treaty with respect to this dredging, and the Commission is of the opinion, in view of the prohibition of this article, that unless some action be taken by the applicant to meet these requirements, the dredging work cannot be considered to have been done lawfully or in accordance with this provision of the Waterways Treaty, because it admittedly affects the "level" and "flow" of boundary waters.

It may perhaps be further remarked that those in authority in either of the countries should not lightly take upon themselves the responsibility of determining whether a proposed use, obstruction or diversion of boundary waters will or will not affect the level or flow of such waters on the other side. The High Contracting Parties, in the absence of a special agreement between them in respect thereto, have created a tribunal before which all such questions should be brought, and it would not be conducive to that spirit of fairness and of mutual co-operation with which the Treaty should be carried out, for one side to determine in an *ex parte* manner, and without reference to the other side, questions involving the use, obstruction or diversion of these boundary waters now prohibited by the Treaty except as therein provided.

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EVIDENCE SUBMITTED AT THE HEARING IN MONTREAL.

As stated above the only testimony submitted was that of witnesses examined by the applicant. A very brief summary of this testimony will be sufficient, because as stated by Hon. Mr. Guthrie, there was not much between the parties upon the facts.

In the first place there is no doubt that the construction of the weir, if it be permanently maintained, will close to navigation the South Sault channel unless some alternative route be available. As to its effect on levels in the north channel, the following excerpt from Mr. Rickey's testimony is sufficiently explicit:—

“We will consider three stages of flow in the St. Lawrence river. We will first take the minimum stage, about 200,000 second feet. The effect of the submerged weir will be to prevent a large proportion of the water that would otherwise flow down the South Sault channel from passing through that channel and divert that water through the Big Sny channel into the main channel on the north side of Long Sault island. This statement assumes that the same quantity of water is drawn through the Massena power canal. When analyzing the elevations of the water at the weir for the stage of 200,000 second feet, we find that the water level at lock 21 will be raised about 3 or 4 inches, which is an improvement to navigation, because every inch of increased draft there is an assistance to navigation and particularly at low water periods of the year when in times past boats have had to lighten their draft in order to pass over the upper sill of lock 21. . . .

“The average stage of the St. Lawrence is about 250,000 second feet. At such stage the water level at lock 21 will be similarly raised, but it is of no benefit to navigation because you already have some fifteen and a half or sixteen feet depth of water over the sill, but it is no detriment because it is at a little greater elevation and will allow boats to enter the locks somewhat more freely than they otherwise would.

“If now we pass on to the maximum stage of water in the river, we find that the rise at lock 21 is again substantially four inches.... Analyzing the river levels under these conditions, we then find that the coping of lock 21 will be about a foot and a half higher than the water level, so there is no danger of the water flooding the coping of the lock. Now having analyzed the low water conditions where we find an improvement, the average water stage where there is no detriment, and possibly just a little easier entrance to the lock, and the flood water stage where there is no damage done to the lock, it is my opinion that these works will be an improvement to navigation.”

There is another effect of the construction of the submerged weir, and that is the raising of the level of the water in the power canal. As to this point Mr. Rickey says:—

“At an average stage of 230,000 second feet, with the canal discharging about 28,000 to 29,000 second feet, which is the quantity of water used when we are developing 89,000 horse-power, the water level without the submerged weir will be substantially at elevation 198. . . . After the submerged weir is built the water level under the same conditions will be elevation 202.5. The rise at the inlet to the canal will therefore, be 4.5 feet”

Further on he adds:—

“The Massena power-house is very well equipped with turbines and generators to determine the amount of water that we can apply to the coupling between the turbine and generator shaft, because if we put any more power on we will burn up the generators. In fact, we did that the other day. There was a slight accident, and it will take a few days to make the repairs. After the

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submerged weir is built the level at the inlet to the canal will be 202.5, and the level at the power-house in the fore-bay will be elevation 201; whereas, under present conditions, the level would be 195. Consequently, there will be 6 feet additional head at the Massena power-house. Now since we have 6 feet greater head and are developing the same power, we will use correspondingly less water. So water that is now being diverted to Grasse river through the Massena power canal will be correspondingly diverted to the Big Sny and help raise the level at lock 21, particularly under low water conditions. The head at the power house will be increased about 6 feet. We now develop a maximum of 86,000 horse-power. If we increase the head, that reduces the quantity of water, because the higher the head the less quantity of water required."

On cross-examination, Mr. Rickey stated that the present head is in the neighbourhood of 35 feet, and admitted that with the additional head of 6 feet, 16,000 more horse-power could be obtained, provided, of course, more turbines were added.

It may be observed that the application does not call for, nor does the order of the Commission grant, any approval whatever of diversion of water from the St. Lawrence river through the power canal of the applicant. This is clearly shown by the final paragraph of the order. If the applicant has no right to divert water from the St. Lawrence river—and no evidence was made of any protest against the diversion which it has been making since a number of years, for the power canal was constructed and was in operation long before the Waterways Treaty—the order of the Commission gives it no such right. It will therefore be open to the state of New York or to any other interest to question this diversion. Under the order of approval adopted, no vested rights of diversion will be acquired by the applicant and no existing right to object to this diversion—if such right exists to-day—will be prejudicially affected.

ICE CONDITIONS IN THE SOUTH SAULT CHANNEL.

In his evidence Mr. Rickey fully explained what are the ice conditions in the South Sault channel at the present time. About the end of December, to use as much as possible his own language, ice jams start to form in the vicinity of Cornwall island and build up both channels. In severe winters these ice jams will continue following up the South Sault channel. In addition there is a different set of ice jams that are formed by ice coming down the main channel of the St. Lawrence river which divides into two parts, some of which will go between the northwesterly end of Croil island and the main shore through what is known as Farrans Point channel. The remainder of the ice goes through the main channel on the south side of Croil island. It there splits. Part of the ice will go down the Big Sny and into the main channel north of Long Sault island. The remainder will go down the South Sault channel on the south side of Long Sault island. When a strong northwesterly wind is blowing, substantially all of the ice of the river will be blown into the channel south of Croil island, and in such cases a very large part of the ice will be diverted into South Sault channel near Peppermill point, about one mile east of the intake of the power canal. Immediately below that point the channel widens out and is deep and the current slow. The ice is therefore not carried off as fast as it is brought into the channel and the ice jams begin to form in the vicinity of Peppermill point.

The way in which the proposed weir in connection with the dredging above will remedy these ice troubles was explained in detail by Mr. Rickey and by Mr. B. F. Groat, a hydraulic engineer of the Aluminum Company. Certain channels have been dredged out in the bed of the river and the wing dam, mentioned in the permit above described, will throw the surface currents across these channels, while the bottom of the channels will carry the water down that dredged channel underneath the surface currents so that it will be comparatively free of ice. The surface currents with the ice

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go down the Big Sny, and the subcurrents continue free from ice down the South Sault channel. The object of the submerged weir, says Mr. Groat, is to raise the level of the water at the intake of the power canal and reduce the slope passed down over the shoals, so that there will not be such a strong draft under and across the boom tending to sweep the ice under it. The pool of water below the boom and extending down to the crest of the submerged weir will freeze over, and the water will flow under the ice and into the mouth of the canal.

There was no attempt to contradict the statements of Messrs. Rickey and Groat, and in a case of this importance, with new problems of engineering under discussion, one would have thought that engineers would have been called on to testify by the opposing interests. The only suggestion made was that Mr. Rickey himself several years ago had stated that it would be entirely practicable, with properly equipped gangs of men, to keep the South Sault channel open in winter. But Mr. Rickey replied that when he made this statement he had only three year's experience, and that his much longer experience to-day led him to change his mind. If any other means of dealing with the ice troubles than the construction of the submerged weir is available to the applicant, the opposing interests would no doubt have introduced testimony to show that another remedy could be adopted. The same remark seems to dispose of the contention made in some of the Statements in Response, that the applicant could procure electrical energy elsewhere to make up for the winter shortage of power. No evidence of the availability of this power was made. Mr. Davis, President of the Aluminum Company, testified that it was not available, and the Commission is left with the testimony all on one side, and can only resort to this testimony to decide the points in issue between the parties.

Also, with regard to the effect of ice troubles on the production of aluminum during the winter months, and the possibility of increasing the output by at least 6,000,000 pounds if the weir is put in, there is no contradiction of the sworn testimony adduced by the applicant. The Commission therefore must accept these important factors as being conclusively established by the evidence submitted at the hearing.

There is just another point on which the witnesses produced by the applicant were uncontradicted, and that is with respect to the navigability of the South Sault channel. From the statements of several witnesses, it appears that up to approximately ten years ago there was some navigation on the South Sault channel, but that to-day, except for an occasional motor boat, this channel is not used for navigation purposes, certainly not for the transportation of freight. It cannot, however, be said that the South Sault channel is unnavigable, but it is so little navigated under present conditions that, apart from the question whether Canada can insist on its remaining open as a matter of absolute right, its value is much greater for the development of power than for navigation purposes. The evidence adduced does not permit the Commission to determine what effect this development may have on a larger scheme of development of the whole river, at the Long Sault. Fortunately, under the form of order adopted, these questions remain open and can be determined at a later date and with a better knowledge of all the conditions.

There remains the consideration of the very important legal questions discussed by the eminent counsel who appeared for the different interests.

The question should be dealt with immediately for if the Commission be without jurisdiction it is without power to adjudicate on the application under consideration.

The Dominion of Canada, as well by its Statement in Response filed before the Commission, as by the oral argument of counsel on its behalf, has denied the jurisdiction of the Commission to grant this application.

The grounds of this denial of jurisdiction are that by Article VII of the Webster-Ashburton Treaty of 1842, it was stipulated "that the channels of the River St.

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Lawrence on both sides of the Long Sault island and of Barnhart island . . . shall be equally free and open to the ships, vessels, and boats of both parties." From this it was urged that any interference with the free and open navigation of the south Sault channel is not within the jurisdiction of the International Joint Commission, but should be dealt with by direct negotiations between the High Contracting Parties.

Briefly stated this denial of jurisdiction contends that inasmuch as it was agreed that the South Sault channel should be equally free and open to the ships, vessels and boats of both parties, the Commission has no jurisdiction to grant the prayer of the applicant.

If this means that because of Article VII of the Webster-Ashburton Treaty, the Commission should not, as a matter of international right, grant the present application, the point is one that can be very properly urged before the Commission, but if the objection to the jurisdiction of the Commission to consider and pass upon the application and to grant the prayer of the same, if the applicant has justified the right thereto, the Commission is unable to agree with this contention.

It is obvious that the whole foundation of the jurisdiction of the Commission is to be found solely in the Waterways Treaty. A stipulation made in the Webster-Ashburton Treaty may be binding on the High Contracting Parties, and may be so considered by the Commission, but it is certainly without effect on the jurisdiction conferred on this Commission by the Waterways Treaty.

Looking therefore at the latter Treaty alone, Article VIII determines the jurisdiction of the Commission over all boundary waters, and gives it jurisdiction over and power to pass upon "all cases involving the use or obstruction or diversion of the waters with respect to which under Articles III and IV of this treaty the approval of this Commission is required."

Article III refers to boundary waters and to their use, obstruction and diversion, and before any new use, obstruction or diversion can be made, saving the case of a special agreement between the High Contracting Parties, the authority of the country in which the use, obstruction or diversion is made and the approval of the Commission are required. The South Sault channel is a boundary water within the definition of the Treaty, the Preliminary Article of which defines boundary waters.

"as the waters from main shore to main shore of the lakes and rivers and connecting waterways, or the portions thereof, along which the international boundary between the United States and the Dominion of Canada passes, including all bays, arms, and inlets thereof, but not including tributary waters which in their natural channels would flow into such lakes, rivers, and waterways, or waters flowing from such lakes, rivers, and waterways, or the waters of rivers flowing across the boundary."

Therefore the Commission has jurisdiction with regard to any obstruction intended to be placed in this channel, which is undoubtedly a boundary water, and the proposed weir is such an obstruction.

It is unnecessary to refer to Article IV (which applies to waters flowing from boundary waters and the waters at a lower level than the boundary, within which description the Long Sault channel does not come) further than to say that this Article emphasizes the wide jurisdiction which is conferred upon the Commission by the Treaty.

Even assuming that the Webster-Ashburton Treaty prevents the construction of the proposed weir, the prohibition of this Treaty can give rise to no objection to the jurisdiction of the Commission to hear the application, but may be merely urged as a reason why the application should be denied.

This sufficiently disposes of the objection that the Commission is without jurisdiction, which objection in the opinion of the Commission is groundless.

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THE WEBSTER-ASHBURTON TREATY.

The main contention of the Canadian Government and of the other interests 1842 is an absolute bar to the construction of the proposed weir in the South Sault channel. This Article is in the following terms:—

“VII. It is further agreed that the channels in the river St. Lawrence on both sides of the Long Sault islands (Croil island was then called “Upper Long Sault island”) and of Barnhart island, the channels in the river Detroit on both sides of the island Bois Blanc, and between that island and both the American and Canadian shores, and all the several channels and passages between the various islands lying near the junction of the river St. Clair, with the lake of that name, shall be equally free and open to the ships, vessels and boats of both parties.”

On the one hand it was contended that this provision absolutely prevents the construction of the proposed submerged weir, and on the other hand, while there was some discussion as to the exact meaning and effect of Article VII, the chief contention was that this Article has been superseded by the provisions concerning navigation of the Waterways Treaty, and is no longer a binding enactment.

It is needless to say that the legal problem thus submitted to the Commission is an extremely important one. Without any idea whatever of reflecting in any way on the arguments of counsel, it may be added that this question should be most exhaustively argued, and that before deciding it the Commission should have ample time for full consideration.

Neither of these requirements has been available to the Commission. The arguments of counsel—probably on account of the very magnitude of the interests involved and the many questions of fact arising out of the testimony, and also on account of the number of those who desired to be heard—did not deal exhaustively with this question. Giving the fullest possible effect to Article VII of the Webster-Ashburton Treaty, it still remains to determine whether the words “free and open” have the absolute and unqualified meaning contended for. These words are used in other provisions of the same treaty, especially in Article II where it is stated that “all water communications and all the usual portages along the line from Lake Superior to the Lake of the Woods, and also Grand Portage, from the shore of Lake Superior to the Pigeon river, as now actually used, shall be *free and open* to the use of the citizens and subjects of both countries.” These words are also used in the Treaty of Washington of 1871, as to the navigation of the river St. Lawrence, from the forty-fifth parallel of north latitude to the sea, and this is a treaty right secured by the citizens of the United States. Would it be contended that the closing of the Rainy river at International falls for power development, which has been done, or of the St. Lawrence river at the Lachine rapids, where an alternative navigation route exists via the Lachine canal, would be a violation of treaty rights? And there is a further question whether the High Contracting Parties, in 1909, did or did not, by the navigation provisions of the Waterways Treaty, extending to all navigable boundary waters as defined by this treaty,—and the South Sault channel is a navigable boundary water—supersede or at least absorb the prior and incomplete navigation provisions of the Webster-Ashburton Treaty of 1842? It is sufficient to simply state these questions to show that they should not be hastily decided, but only after the most exhaustive argument and the fullest consideration.

Time was wanting for this full consideration. A sudden emergency had arisen. The Secretary of War of the United States, in a letter dated August 23, 1918, and addressed to the Commission urged that the permit he had granted to the applicant be approved. He stated that “the War Industries Board is apprehensive that the

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supply of aluminum will not be adequate for the requirements of the Government and of our Allies, and is therefore wisely encouraging the increase of output. The War Department is, I need not say, vitally interested that there shall be at all times an adequate supply of this product to meet the requirements of our military program and the program of our Allies." (See the whole of this letter printed in the appendix to this Opinion). The uncontradicted evidence showed that this weir had to be immediately commenced, and that if the authority to construct it should come later than the 15th of September, it would be very doubtful whether it could be completed this year. (See the statement of Mr. Rickey at the close of the Montreal hearing). Under these circumstances the Commission had to take the responsibility of acting immediately so as to cope with this sudden and very urgent emergency. It is confident that while discharging its duty so as to fully provide for this emergency, it has so framed its order of approval that no rights of either country or of any of its citizens can possibly be jeopardized by its action.

SCOPE OF THE ORDER OF APPROVAL.

The principle which dominates the order of approval granted by the Commission is that the construction of the submerged weir is approved merely for a term of five years or until the termination of the present war, whichever shall last occur. The order of approval is adopted "as an interim measure," and the Commission does not, at the present time, finally decide the question whether it should approve of the construction and permanent maintenance of the weir. In other words, following the practice of courts familiar to all lawyers, an interim order is made, and the whole question of the right of the applicant to construct and maintain the weir is not finally passed upon. The question therefore remains an open one, and no right of any Government or interest to object to the weir as a permanent structure is affected by the order of approval.

The order goes further and obliges the applicant to remove the weir at the expiration of the period specified. By constructing it under the terms of the order, the applicant accepts this condition, and without any further order of the Commission is bound to remove the weir. There does not seem therefore to be any ground for the fear expressed by Hon. Guthrie, in his argument before the Commission, that "if it goes in, it will never come out," for it must come out unless the Commission, on a new application, and after hearing all parties interested, allows it to be maintained. The removal of the weir, at the end of the term fixed, is not even conditioned on the reimbursement to the applicant of the moneys it has expended in constructing it. In other words, if the applicant builds the weir, it can only build it as a temporary structure, and must remove it unless a new order is obtained from the Commission, and if the company applies for a new order, the whole question of its right to place an obstruction in the South Sault channel will be examined anew as if this order of approval had never been granted.

It is to be further observed that the applicant is identically in the same position should the Secretary of War of the United States order the removal of the weir. The permit of the War Department contains the express condition,

"that if future operations by the United States require an alteration in the position of the structure or work herein authorized, or if, in the opinion of the Secretary of War, it shall cause an unreasonable obstruction to the free navigation of said water, the permittee will be required, upon due notice from the Secretary of War, to remove or alter the structural work or obstructions caused thereby without expense to the United States, so as to render navigation reasonably free, easy and unobstructed; and if, upon the expiration or revocation of this permit, the structure, fill, excavation or other modification of the water-course hereby authorized shall not be completed, the permittee at his own

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expense, and to such extent and in such time and manner as the Secretary of War may require, shall remove all or any portion of the uncompleted structure or fill and restore to its former condition the navigable capacity of the water-course. No claim shall be made against the United States on account of such removal or alteration."

Mr. Gordon, in his argument before the Commission, stated that if the company does not remove the structure within the time specified by the Secretary of War, it would be liable to a fine of \$5,000 a day. Looking at the matter from any viewpoint, it is clear that the applicant acquires no vested right by virtue of the order of the Commission, and the condition imposed by this order is even more rigorous than that contained in the permit issued by the Secretary of War, for the expiration of the term specified, without any further order of the Commission, compels the applicant to remove the weir.

As a matter of fairness, however, and because the order of the Commission is a mere interim measure, this order reserves to the applicant or any other interested party the right to apply to the Commission, at least one year before the expiration of the period specified, for a further continuance of the submerged weir. It will make this application without having acquired any vested right by reason of the present order, and then the Commission may approve of such continuance on such terms and conditions as it may deem appropriate and equitable for the protection of the rights and interests of the people on both sides of the line in accordance with Article VIII of the Waterways Treaty. It is not easy to see how the rights of the people in both countries could be more carefully safeguarded; and if, on such application, the continuance of the weir is not allowed, the applicant will be obliged to remove it.

An important condition of the order is that whereby, for the purpose of protecting the rights, property and interests on either side of the boundary from any injurious effect resulting from the construction and maintenance of the weir, the Commission, during the term of its approval, retains jurisdiction over the subject matter of the application, and may make such further order in the premises as may be necessary.

A fear has been expressed that some damage may be caused to Canadian interests by reason of the construction of the weir. Should such damage occur, and the opposing interests did not introduce any testimony to show that it is seriously to be apprehended, the commission can be and should be appealed to. Before the making of an application for the continuance of the weir there will be at all events ample time to ascertain whether there has been any detriment to navigation or other interests. And there appears no doubt that the questions which have been discussed before the Commission will then receive from all interests the attention they deserve, and that the Commission will be assisted in the discharge of its duty by full and complete testimony concerning any possible effect of the construction and maintenance of the submerged weir.

With respect to the Statement in Response filed by the State of New York, and its claim that the construction of the weir would be an invasion of the rights of its citizens in and to the navigable waters of the St. Lawrence river, and of its rights of ownership of the bed of the river, it will be sufficient to say that no such rights are in any way affected by the order of approval.

It has not escaped the Commission that there is some vague fear that a powerful company will obtain, under the order of approval, some rights, powers, and privileges which properly belong to the public. It is hoped, however, that a careful examination of the order of approval will convince any unprejudiced critic that the Commission has not sanctioned any real invasion of sovereign or public rights. It was called upon to discharge its duties under circumstances which required it to take full responsibility for the order of approval it has granted. It feels that when all these circumstances

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are calmly considered and the order of approval is carefully read, any feeling of apprehension of impending detriment to the public weal will be dispelled.

There is just another matter which may be mentioned, if only to show that the Commission did not refuse to give it all the attention to which it was entitled. When the Commission met in New York on September 12, to consider its decision on the application, Mr. Frank H. Keefer, K.C., on behalf of the Government of Canada, applied for leave to lay before the Commission an Order in Council of the Canadian Government bearing date September 2, whereby that Government proposed to the Government of the United States to withdraw the whole matter from the purview of the Commission and to make it immediately the subject of diplomatic negotiations between the two Governments. Mr. George W. Koonce, of counsel for the United States, who was present when Mr. Keefer came before the Commission, stated that the view of the latter Government was that the Commission should dispose of the application which was regularly before it. Inasmuch as the Commission can entertain no doubt as to its full jurisdiction, it is obvious that, unless a special agreement had been made under the treaty, and there was no suggestion that any such agreement had been entered into, the duty of the Commission was to pass upon the application. This it has done, but it may be permitted to say that it has given to the Order in Council of the Canadian Government its most serious and respectful consideration.

The order of approval is granted subject to the conditions therein mentioned.

Opinion by Mr. Mignault.

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APPENDIX.

I.

WAR INDUSTRIES BOARD.

WASHINGTON, August 8, 1918.

The Chairman,
International Joint Commission,
Washington, D.C.

MY DEAR SIR,—The War Industries Board is apprehensive that the supply of aluminum may not be adequate to the demands of the Allied Governments, and is therefore particularly desirous that any opportunity for increasing the output be taken advantage of. While there is at present just about a balance between the demand and the supply of aluminum, it would be a great advantage to increase the output, especially as the demand is likely to be increased, while the output cannot be increased except by new construction. Such an increase would be an insurance against fire, strikes, and other causes.

In addition I may state that there is practically no available stock of aluminum on hand. During the winter we expect not only interruptions in transportation but also interferences in power, and especially at Niagara Falls, New York.

We therefore recommend that the application of the Aluminum Company of America, for which permit was received from the United States Government, to build a submerged weir in the St. Lawrence river near Massena, New York, be granted. As this weir is in a boundary stream the permit has also to be approved by the International Joint Commission and we therefore beg that you approve this application.

The construction of the weir will increase the horse-power at Massena by some few horse-power all the time, but its object is the remedial effect on ice conditions. The plant now produces 80,000 horse-power for nine months in the year, but is reduced by from 5,000 to 15,000 horse-power during the months of January, February and March. The construction of a weir will substantially relieve that condition and if work can be permitted on the construction of the weir a large increase in output for the first three months in 1919 will be effected,—the time when we most need this increase in output, especially in the production under the Aircraft program.

It is believed that there will be absolutely no disadvantage to Canadian navigation, and for reasons given above we beg that you approve the application for the submerged weir on the St. Lawrence river at Massena, N.Y., asked for in the application.

Yours very truly,

B. M. BARUCH,
Chairman War Industries Board.

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II.

WAR DEPARTMENT,
BUREAU OF AIRCRAFT PRODUCTION,
Washington, August 9, 1918.

From Office of the Director of Aircraft Production

*To Chairman, International Joint Commission of the United States and Canada,
Southern Building, Washington, D.C.*

SUBJECT:

1. It seems very advisable to increase the production of aluminum, and we understand this can quickly and easily be done by allowing the permit that the Aluminum Company of America have made application for to construct a submerged weir in the St. Lawrence river at Massena, N.Y.

2. As this matter is of the greatest importance and as we understand the International Joint Commission of the United States and Canada meets next Monday, we heartily recommend immediate and favorable action on the application of the Aluminum Company of America, unless there are some specific and important navigation difficulties that present themselves to make this action inadvisable.

By direction of the Director of Aircraft Production.

M. W. KELLOGG,
Acting Director of Aircraft Production.

III.

WAR DEPARTMENT,
Washington, August 23, 1918.

THE HONOURABLE,

THE CHAIRMAN OF THE INTERNATIONAL JOINT COMMISSION,
Washington.

Sir,—The War Industries Board is apprehensive that the supply of aluminum will not be adequate for the requirements of the Government and of our Allies, and is therefore wisely encouraging the increase of output. The War Department is, I need not say, vitally interested that there shall be at all times an adequate supply of this product to meet the requirements of our military program and of the programs of our Allies.

I am informed that the Aluminum Company of America has made application for a permit to build a submerged weir in the St. Lawrence river near Massena, New York, with a view of increasing the horsepower at that point during the months of January, February and March, to meet the interference in power at Niagara which normally occurs during the winter months. As the proposed weir is in the boundary stream, the permit, which I understand has been received from the United States Government, requires the approval of your Commission. It is believed that no disadvantage to Canadian navigation will result from such a construction.

In view of these facts, may I respectfully urge that this permit receive your approval, if consistent with the practice of your Commission.

Respectfully yours,

NEWTON D. BAKER,
Secretary of War.

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INTERNATIONAL JOINT COMMISSION.

IN THE MATTER OF THE APPLICATION OF THE ST. LAWRENCE RIVER POWER COMPANY FOR APPROVAL OF PERMIT No. 38786/64 GRANTED 10th SEPTEMBER, 1917, BY THE SECRETARY OF WAR OF THE UNITED STATES TO EXTEND TO LONG SAULT ISLAND, BY MEANS OF A SUBMERGED WEIR, THE JETTY OR DEFLECTING DYKE IN THE SOUTH CHANNEL OF THE ST. LAWRENCE RIVER AT THE SOUTH OF ITS POWER CANAL AT MASSENA, NEW YORK.

TO THE HONOURABLE THE INTERNATIONAL JOINT COMMISSION,
WASHINGTON, D.C., AND OTTAWA, CANADA.

The Government of the Dominion of Canada has given this matter most careful consideration. The Government of the Dominion of Canada realizes the importance of internationally co-operating with the Government of the United States in any manner that is conducive to the maximum of war efforts of each nation, and if such were all that were involved in this application there would be no difficulty as to same. There are, however, other questions affecting (a) the navigation of the River St. Lawrence, Canada's great artery to the sea, and (b) the future development of great potential water-powers along and upon the St. Lawrence.

At the Long Sault Rapids there is a potential development of some 700,000 horse-power if developed internationally by the Governments of the United States and Canada. Of this potential horse-power there has been developed by the applicant only 35,000 horse-power. The Government of Canada would readily enter into intimate negotiations with the Government of the United States leading to the immediate development and utilization by both countries of this large potential water-power. The Government of Canada believes that such a question involving as it necessarily does the question of navigation and canal systems, should only be dealt with internationally. The Government of Canada has been advised that navigation interests at this point will be seriously affected by the construction of the proposed works.

Therefore the undersigned as Counsel for the Dominion of Canada, respectfully submits:—

(1)

The Applicant Company is a corporation chartered by the State of New York, with principal office at Massena, New York. It is believed to be a subsidiary corporation of the Aluminum Company of America. It has for some years developed hydro-electric-power in its power-house at Massena, New York, by diverting water through its power canal, from the South Sault Channel of the St. Lawrence River to Grasse River. The diverted water later returns to the St. Lawrence River above St. Regis, Quebec.

(2)

The Company represents that whilst it has a capacity of 85,000 horse-power at Massena, during normal conditions, generated from the water diverted from the St. Lawrence River, this is reduced to between 5,000 and 15,000 horse-power during the winter months by huge ice jams in the South Sault Channel, and the Company represents that in the production of aluminum this means a loss of six million pounds every winter.

The Company has applied for approval of plans for the construction of a weir in the South Channel of the St. Lawrence River at the mouth of its power canal.

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(3)

In forwarding the application the Acting Secretary of State enclosed letters from the Chairman of the War Industries Board and the Acting Director of Aircraft Production to the Chairman of the International Joint Commission pointing out the urgent necessity of increasing the production of aluminum and asking that the application of the St. Lawrence River Power Company be favourably considered and acted upon with all celerity provided navigation interests are unaffected thereby.

(4)

A copy of this Application was filed with your Commission at Washington on the 9th of August, 1918, but copies were not filed with the Government of Canada until Monday, 19th August.

The rules of procedure of your Commission call for the filing in response to such application, a statement "setting forth any fact or facts bearing on the subject matter of the application and tending to defeat or modify the order of approval sought, or to require that the same be granted on condition, and setting forth whether the order of approval is opposed, in whole or in part, and if in part only, to what extent, and if it be desired that the approval be on condition, setting forth the particular condition or conditions upon which it is thought the order of approval should be granted" and that such statement be filed within thirty days. The said rules also provide that the time for the filing of any paper or the doing of any act required thereunder may be extended.

In the meantime Counsel of the War Department of the United States appeared before your Commission in session at Atlantic City, on the 12th August and moved for the suspension of Rules 9, 10, 11, 12 and 13 of your Rules of Procedure and prayed that the hearing on said application proceed forthwith at that session of the Commission.

Counsel of the Dominion of Canada and Counsel for the Canadian Marine Association appeared and opposed the motion, whereon it was ordered that the hearing be fixed for the 29th August, at Montreal, Canada.

THE GOVERNMENT OF THE DOMINION OF CANADA is unable to agree to the proposed works for the following reasons:—

(a) Both the Channels at the Long Sault stand in a different position to others in the St. Lawrence River, in that by Article VII of Treaty commonly known as "The Webster-Ashburton Treaty of 1842," it is stipulated "That the channels of the River St. Lawrence on both sides of Long Sault Islands and of Barshart Island. . . shall be equally free and open to the ships, vessels and boats of both parties."

(b) Any interference with the free and open navigation of the South Sault Channel specifically mentioned in, and covered by said Treaty is not within the jurisdiction of the International Joint Commission, but should be dealt with by direct negotiations between the high contracting parties to said Treaty.

(c) Furthermore, the Treaty between the United States and Great Britain relating to boundary waters, Treaty series No. 548 is the foundation of the jurisdiction of your Commission.

In Article 1 thereof, it was agreed that "The navigation of all navigable boundary waters shall forever continue free and open for the purpose of commerce to the inhabitants and to the ships, vessels and boats of both countries equally. Subject, however, to any laws or regulations of either country within its own territory not inconsistent with such privilege of free navigation, and applying equally and without discrimination to the inhabitants, ships, vessels and boats of both countries."

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(d) It is respectfully submitted that all boundary waters of the two countries are to continue free and open and that your Commission has no jurisdiction to alter the Treaties subsisting between the high contracting parties relating to same.

(e) Any attempt to close this Channel of the St. Lawrence River specifically agreed to be kept open for navigation, is of much more importance to the Dominion of Canada than to the United States, in that the St. Lawrence River is the main artery for navigation to the Sea by Canada and almost the entire traffic of this river is carried in Canadian bottoms.

(f) The South Sault Channel of the St. Lawrence River has been used by a number of boats, and freight has been transported down such stream, and if it is alleged by the Applicants that it is not now used for navigation it can only be that the said Applicants have diverted about half the natural flow of the waters that should go down this Channel into their power Canal, thereby interfering with navigation to that extent and now seek to entirely close the navigation thereof.

(g) That even now it is the only Channel that can be used for the carrying of logs in rafts and province to the outbreak of the present great European War was so used extensively and when this class of business revives the proposed weir would compel the passing of rafts through the Canal at Cornwall which will be to the detriment of the rafting, the general freight, and passenger business.

(h) That the closing of this Channel, as proposed, will alter the level of the river above, but to what extent the engineers of the Canadian Government have not had an opportunity to definitely satisfy themselves.

(i) That the closing of this Channel will throw the burden of caring for the ice entirely upon the Long Sault Rapids, and possibly create worse conditions than at present in the river above.

(j) That whilst the company asks for permission to construct this weir for the alleged purpose of improving ice conditions in the South Sault channel and at their power plant, evidence shows that it is practicable to handle the ice in a manner so as to render the proposed weir unnecessary for ice protection purposes.

(k) That if the applicants desire more electrical energy during the months of January, February and March as is represented to your Commission, that the blocking of this channel is not the only way by which such additional power may be obtained.

(l) That whilst the increased output is alleged to be necessary to meet an emergency, the words proposed will close the channel for all time.

(m) At present there is only developed at this part of the St. Lawrence river about 85,000 horse-power, and that by private interests, whereas there is capable of international development by the two countries some 700,000 horse-power.

(n) The present applicants without the concurrence of Canada or without the order of this Commission (which it is respectfully submitted should be first obtained) are dredging a channel through Dodger shoal, and it may be that this proposed dam instead of being solely for ice protection is rather a part of the entire scheme to obtain more power at Massena.

(o) If the Dodger shoal be dredged, as the applicants seek to do it will materially affect the level of Canadian waters above the Dodger shoal and the canal system of Canada at this point on the north shore.

(p) If the submerged weir be constructed in the South Sault channel by way of compensation for the dredging at Dodger shoal, then the control of the high and the low water levels at this part of the St. Lawrence river will pass from international territory and control to the power-house at Massena.

(q) That the proposed works are sought to be erected by and then will remain the property of a private corporation, and are situated in the public domain in a large and important channel of a great highway, and it is contrary to the public interests to permit such to be done by private corporations.

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(r) That in connection with the deep waterway from the Great Lakes to the Atlantic, to which Canada is practically committed, the Governments of both countries should keep control of the bed and full flow of the river so that private corporations may not acquire vested interests therein to be afterwards expropriated or repurchased.

(s) As has been repeatedly stated to your Commission, Canada is opposed to any piecemeal development of the St. Lawrence particularly by private corporations.

Respectfully submitted,

FRANK H. KEEFER,
of Counsel for the Dominion of Canada.